

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAVID S. GROSS,

Plaintiff

v.

CHEMBIO DIAGNOSTICS, INC., et al.,

Defendants

Case No.: 3:23-cv-00093-MMD-CSD

Order

Re: ECF Nos. 1, 1-1, 3

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro se complaint (ECF No. 1-1). He has also filed a motion for leave to amend. (ECF No. 3.)

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: “Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

“[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)

(quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee; therefore, the application is granted.

II. SCREENING

A. Standard

“[T]he court shall dismiss the case at any time if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) tracks that language. As such, when reviewing the adequacy of a complaint under this statute, the court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for determining whether a plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.”). Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

The court must accept as true the allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less

1 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9
2 (1980) (internal quotation marks and citation omitted).

3 A complaint must contain more than a “formulaic recitation of the elements of a cause of
4 action,” it must contain factual allegations sufficient to “raise a right to relief above the
5 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
6 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
7 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a
8 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
9 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

10 A dismissal should not be without leave to amend unless it is clear from the face of the
11 complaint that the action is frivolous and could not be amended to state a federal claim, or the
12 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
13 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

14 **B. Plaintiff’s Complaint**

15 Plaintiff alleges that he has been a continuous stockholder of Chembio Diagnostics, Inc.
16 (Chembio) stock since May 2021, and he sues Chembio, a Nevada corporation, and members of
17 its board of directors as well as its executives for violations of sections 14(d), 14(e) and 20(a) of
18 the Securities and Exchange Act of 1934. (ECF No. 1-1.) The court will allow Plaintiff to
19 proceed with his complaint at this point.

20 **III. Motion for Leave to Amend**

21 Plaintiff has filed a motion for leave to amend his complaint to add the U.S. Securities
22 and Exchange Commission; Tara Petta, Vice President of Nasdaq Stock Market LLC; and the
23 Securities Industry and Financial Markets Association (SIFMA) as defendants. (ECF No. 3.)

1 A motion for leave to amend must attach the proposed amended pleading, which must be
2 complete in and of itself without reference to the superseded pleading and must include copies of
3 all exhibits referred to in the proposed amended pleading. LR 15-1(a).

4 Plaintiff's motion fails to include a proposed amended complaint that is complete in and
5 of itself; therefore, his motion for leave to amend is denied.

6 IV. CONCLUSION

7 (1) Plaintiff's IFP application (ECF No. 1) is **GRANTED**.

8 (2) The Clerk shall **FILE** the Complaint (ECF No. 1-1).

9 (3) The Complaint shall **PROCEED** against Chembio Diagnostics, Inc., Katherine L.
10 Davis, John G. Potthoff, David W.K. Acheson, David W. Bepalko, Richard L. Eberly, Leslie
11 Teso-Lichtman, and Lawrence J. Steenvoorden.

12 (4) Plaintiff's motion for leave to amend (ECF No. 3) is **DENIED**.

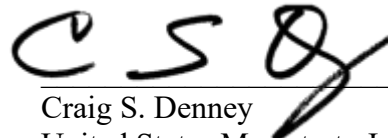
13 (5) The Clerk of Court shall **ISSUE** the proposed summonses for each of the Defendants
14 for service on Defendants. Plaintiff is reminded that under Federal Rule of Civil Procedure 4(m),
15 service must be completed within **90 days** of the date of this Order. If Plaintiff requires
16 additional time to meet any of the deadlines set by the court, he must file a motion for extension
17 of time under Local Rule 1A 6-1 *before* the expiration of the deadline, and the motion must be
18 supported by a showing of good cause. A motion filed after a deadline set by the court or
19 applicable rules will be denied absent a showing of excusable neglect.

20 (6) Plaintiff shall serve upon defendant(s) or, if an appearance has been entered by
21 counsel, upon the attorney(s), a copy of every pleading, motion or other document submitted for
22 consideration by the court. If Plaintiff electronically files a document with the court's electronic
23 filing system, no certificate of service is required. Fed. R. Civ. P. 5(d)(1)(B); LR IC 4-1(b); LR

1 5-1. If Plaintiff mails the document to the court, Plaintiff shall include with the original
2 document submitted for filing a certificate stating the date that a true and correct copy of the
3 document was mailed to the defendants or counsel for the defendants. If counsel has entered a
4 notice of appearance, Plaintiff shall direct service to the individual attorney named in the notice
5 of appearance, at the physical or electronic address stated therein. The court may disregard any
6 document received by a district judge or magistrate judge which has not been filed with the
7 Clerk, and any document received by a district judge, magistrate judge, or the Clerk which fails
8 to include a certificate showing proper service when required.

9 **IT IS SO ORDERED.**

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11 Dated: August 17, 2023

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14 Craig S. Denney
15 United States Magistrate Judge
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